Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:

Petition for Rulemaking	)	
and Petition for Relief	)	DA 94-621
in Section 214 Video Dialtone	)	
Application Process	)	RM-8491

COMMENTS

The Center for Media Education, Consumer Federation of America, National Association for the Advancement of Colored People, National Council of La Raza, and the Office of Communication of the United Church of Christ, (collectively "Petitioners") are pleased that the Commission has acted quickly to obtain public comment on our Petition for Relief and Petition for Rulemaking. We urge that after considering the comments, the Commission act expeditiously to both grant the declaratory relief requested and to institute a rulemaking to revise the section 214 process for video dialtone applications.

We will not repeat the arguments made in our petitions. Rather, we take this opportunity to respond to the arguments and data already presented by some of the Regional Bell Operation Companies ("RBOCs"). US West, for example, filed Oppositions to both petitions without waiting for the Commission's public notice.[1] Bell Atlantic and PacTel have submitted letters to the Commission.[2] The telephone company responses to date

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[1] Both Oppositions were filed June 2, 1994.

[2] Letter from Edward D. Young to James H. Quello, May 25, 1994 ("Bell Atlantic Letter"); Letter from Alan F. Ciamporcero to William F. Caton, June 2, 1994 ("Pactel Letter").

highlight the need for the FCC to grant the requested relief and pose no procedural barriers to such relief.

Three basic issues have emerged to date. First, Petitioners wish to stress that the primary issues they have presented are legal, and not factual. Petitioners merely seek formal confirmation of what they believe always to have been the case; that RHCs must, as a matter of law, present sufficient information in their video dial tone applications for the Commission to be able to conclude that the proposed installations will not be discriminatory. Second, Petitioners' filings have, necessarily been based entirely on the data submitted by the RHC's in their own applications. To the extent that Petitioners' analyses of the data can be characterized as incomplete, it is because the RBOC's filings were inadequate. Petitioners welcome submission of additional and clarifying information, but such new filings do not obviate the need for the Commission to prescribe the filing of such information in a uniform manner. Finally, this case is not about intentional discrimination, it is about discriminatory effect. Some of the RBOCs have indicated that their applications should be granted in their present form because there was no unlawful purpose in how the plans were prepared. But Petitioners' position is that the universal service obligation does not go to purpose, it goes to effect, and that these applications are exclusionary, regardless of how well meaning the intent of the companies which files them.

In this regard, Petitioners note with pleasure that at least one RHC now appears to have presented additional information which, it says, demonstrates that its plans are not discriminatory in effect. On June 16, 1994, Bell Atlantic filed additional 214 applications to provide service in six major markets, including parts of Washington, D.C. and Prince

George County, Maryland, areas with a high minority and low income populations that were excluded from its earlier filing. In the press release describing the filing, a Bell Atlantic spokesperson is quoted as saying "This filing . . . should put to rest any concern about so-called 'electronic redlining.' The racial diversity in the areas served by this new network is greater than that in the overall Bell Atlantic territory."[3]

While Petitioners reserve comment on these specific applications until they have had a chance to carefully review them,[4] we are gratified that at least one RBOC is now paying closer attention to the important policy issue of discrimination. Petitioners look forward to learning whether Bell Atlantic will now agree that this kind of submission is required as a matter of law, or whether it will adhere to the view that such salutory action is purely voluntary on its part.

I. The Comments to Date Demonstrate the Need for the FCC to Clarify its Policy and Filing Procedures

Most of the RBOCs expressed a general commitment to make video dialtone service available to all without discrimination.[5] US West, however, suggests that it does not believe it has any obligation to provide video dialtone universally. Other statements show

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[3] Bell Atlantic News Release, June 16, 1994, at 2, quoting Edward Young, Bell Atlantic Vice President and General Counsel.

[4] Dr. Cooper's initial study was based solely on plans reflected in 214 applications filed with the FCC. At the time he completed the study, Bell Atlantic had yet to announced its plans to serve additional area, much less filed them with the FCC.

[5] For example, Pactel states that it "supports the Commission's video dialtone goals, including the availability of video dialtone facilities to all, regardless of income, race or ethnicity." Pactel Letter at 2. Bell Atlantic stresses that its "commitment to all our customers and the development of America's telecommunications infrastructure remains constant." Bell Atlantic Letter at 2.

fundamental disagreement about what constitutes non-discriminatory deployment. Thus, the Commission should both explicitly reaffirm its commitment to universal service and should clarify what it means by non-discriminatory deployment.

A. The FCC Should Explicitly Reaffirm Its Commitment to the Goal of Universal Video Dialtone Service and to Non-Discriminatory Deployment at Each Phase of Construction

US West asserts that "[a]s to the matter of whether video dialtone service should be included in the 'definition' of universal service, as Joint Petitioners appear to suggest, there are a host of issues that must be addressed before such a commitment can be made." US West Opp. to Relief at 5. This comment suggests that US West does not accept that it has an obligation to make video dialtone service universally available.

Petitioners are not requesting that the FCC revise the definition of "universal service." Rather, they are simply asking the FCC to clarify that the goal in deploying video dialtone is universal service. Such a clarification would impose no new obligations on the RBOCs. In the Further Notice of Proposed Rulemaking ("FNPRM")[6] proposing the adoption of a video dialtone policy, the Commission made it clear that it envisioned video dialtone as a service that would ultimately be available to all of the people of the United States. For example, it concluded that adopting its video dialtone policy will "promot[e] the development of an efficient, nationwide, publicly-accessible, advanced telecommunications infrastructure." 7 FCC Rcd at 304, ¶ 6 (emphasis added). It explains that:

> under Section 1 of the Communications Act, the Commission should seek to make available nationwide, publicly accessible, advanced telecommunications

[6] Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, CC Docket No. 87-266, 7 FCC Rcd 300 (1991).

> networks able to provide adequate facilities at reasonable charges. Such an advanced infrastructure might some day include switched, broadband capability and integrated voice, data, and video services.

Id. at ¶ 7.[7]

Commenting on the Further Notice, CFA and UCC questioned whether the FCC's proposal provided sufficient "incentive for the LECs to serve consumers or groups who lack sufficient marketplace clout to meet their needs." CFA/UCC Comments (filed Feb. 3, 1992) at 8. CFA/UCC was particularly "concerned that the access to telecommunications services obtained after years of struggle by low income persons, disabled persons, children and non-profit groups, could effectively be wiped out should the advanced telecommunications network develop as envisioned." Id.

In direct response to CFA/UCC's comments, as well as other commenters who asked that universal service be made an independent objective of the video dialtone policy, the Commission affirmed that the goal of its video dialtone policy was universal service:

> we agree with those parties asserting that encouraging universal service is an implicit goal of video dialtone insofar as we seek to fulfill our mandate under

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[7] Section 1, 47 U.S.C. § 151, provides the statutory basis for the concept of universal service. Statements through out the Further Notice indicate that the Commission viewed video dialtone as a universally available service. See, e.g., 7 FCC Rcd at 306-07, ¶ 10 ("Ultimately, video common carriage could be offered over a broadband network analogous to the existing nationwide switched narrowband network. Such a network would enable any subscriber to transmit and receive a video signal to or from any other subscriber."); Id. at 309, ¶ 15 (noting that "presence of an alternative broadband network generally available on a common carrier basis" (emphasis added) would stimulate competition and efficiency."); Id. at 310, ¶ 17 ("the diversity benefits we seek are premised upon non-discriminatory access for program suppliers and consumers"); Id. at 314, ¶ 24 ("Just as the average consumer now can easily access an array of services through his or her telephone, we envision video dialtone as facilitating access to a similar plethora of video services.")

Section 1 of the Communications Act. Thus, it is unnecessary to state independently such as an objective here as proposed by some commenters.[8]

US West's contrary suggestion that it has no universal service responsibilities with regard to video dialtone highlights the need for the Commission to clarify now, once and for all, that the goal of its video dialtone service is to achieve universal service.

B. The Commission Should Clarify What Non-Discriminatory Service Entails

While all three RBOCs appear to accept a general duty to offer their service on a non-discriminatory basis, there is a wide variety of opinion as to what this means. We recognize, of course, that the RBOCs cannot build everywhere at once. But, what is the relevant time frame for assessing whether discrimination is occurring? Is it enough, for example, that Pactel expects to serve about one-half of the state by the year 2000 and all subscribers by the year 2010?[9]

This kind of response ignores the important policy question of who gets served in 1995 or 1996 and who has to wait until the year 2010 to be served (or perhaps will never get service). As we explained in the Petition for Relief at 11-12, the Commission's goals of improving the infrastructure, promoting competition and fostering diversity will be undermined if video dialtone is not deployed in an equitable manner.[10]

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[8] Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, 7 FCC Rcd 5781, 5806, ¶ 47 (1992) (footnotes omitted).

[9] Pacific Bell Press Release, "Pacific Bell Refutes Redlining Claim, Vows to Bring Superhighway to all Californians," May 25, 1994. "Coalition Charges Four Phone Firms with 'Redlining' in Adding Networks," Wall Street Journal, May 24, 1994.

[10] Indeed, to the extent that infrastructure investments are intended to achieve social purposes and stimulate economic development, it be make better public policy to overrepresent disadvantaged communities in the early stages, since these are the communities most in need of this investment and the services that it could offer.

Similarly, what is the relevant geographic area for assessing discrimination? Pactel requests that the analysis be done on a statewide basis. Pactel Letter at 3. Bell Atlantic implies that the entire multistate service area is the appropriate measure.[11] US West appears to be using an extended metropolitan area. See Cooper Affidavit (June 11, 1994) at ¶ 8. Petitioners believe that all of these areas are much too large to be meaningful. For example, these areas far exceed local political jurisdictions, local calling areas or local cable franchise areas. But in any case, these comments point out the need for FCC clarification.

C. Criticisms of the Petitioner's Study Demonstrate the Need for Census Data and Other Requested Relief

Only one RBOC -- US West -- has so far provided data in an attempt to refute the results of Dr. Cooper's analysis. Yet, as detailed in the attached Affidavit of Dr. Cooper, US West's Opposition only reinforces the need for the relief requested.

Petitioners requested that applicants be required to indicate which census tracks they intend to serve. Petition for Rulemaking at 3. One reason for mandating identification of census tracks is that census track data is widely available to the general public through libraries and thus is more easily analyzed and verified. Although US West clearly has census track data, see Opp. to Relief at 2, US West reports income and ethnic/racial data by wire center. This kind of reporting makes analysis by outside parties extremely burdensome. See Cooper Affidavit (June 11, 1994) at ¶ 9.

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[11] In its June 16, 1994 News Press, Bell Atlantic compared minority population in the areas to be served with advanced services to the minority population in the overall Bell Atlantic territory.

US West criticizes Dr. Cooper's Study as ""haphazard." Opp. to Relief at 6. However, as Dr. Cooper emphasizes, his analysis can only be a good as the data submitted in the applications. The data contained in the 214 applications was incomplete and was not provided in a format that permitted precise analysis. Cooper Affidavit (May 19, 1994) at ¶ 8. Again, these problems with the data demonstrate the need for the FCC to clarify the type of information to be included in 214 applications.

Dr. Cooper is also criticized for omitting Los Angeles from his analysis. Pactel Letter at 2. However, as Dr. Cooper notes, it was virtually impossible to ascertain from the information provided in the 214 application for Los Angeles who is being served and who is not. Cooper Affidavit (June 11, 1994) at ¶ 10. Similarly, Pactel criticizes the failure to include Asians in the analysis.[12] Pactel Letter at 2. However, the limited resources of the Petitioners preclude extensive analysis of every area and every minority group. Again, these comments point up the need for the requested relief. Were the Commission to require that census data be filed with the 214 applications, that public notice of the filings be given and that public hearing be held, local organizations would have the ability to do the analysis appropriate for their own communities.

II. US West's Procedural Objections are Without Merit

In its Opposition to Petition for Relief, US West opposes the requested relief on ground that we are asking FCC to modify its rules and asserts that "the proper vehicle for

[12] In addition, Dr. Cooper did not initially analyze the impact of US West's deployment plans on American Indians residing in Denver. With the data now supplied by US West, Dr. Cooper has found that the unserved areas have percentage of American Indians that are between 1.5 and 2 times that of the served areas. Cooper Affidavit (June 11, 1994) at ¶ 5.

addressing most of Joint Petitioners' requests would be a rulemaking." Opp. to Relief at 3-4. In its Opposition to Petition for Rulemaking, however, US West claims rulemaking is unnecessary because FCC has sufficient authority under § 202 to remedy discriminatory conduct. Opp. to RM at 2.[13] US West cannot have it both ways. In any case, FCC clearly has authority to grant the relief requested in the Petition for relief, i.e., issuing a general statement of policy, interpreting existing statutes and regulations, and adopting internal procedures and practices, without taking the time to complete a rulemaking. Administrative Procedure Act, 5 U.S.C. § 553(b)(a). See generally American Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045-48 (D.C. Cir. 1989).

US West also suggests that the FCC has no authority to act until Petitioners are harmed, i.e., after the FCC grants the section 214 Applications. Opp. to Relief at 3. At that time, according to US West, the FCC has sufficient authority under § 202 to remedy the problem.[14] This reasoning ignores the fundamental premise that the FCC cannot grant a section 214 application unless it finds that the grant would serve the public interest. 47 U.S.C. § 214(a). If the applicant is proposing to discriminate, the grant would not serve the public interest. Moreover, as a matter of sound policy, it would make no sense to let telephone companies spend billions of dollars to construct discriminatory systems, and only

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[13] US West also opposes a rulemaking on the ground that the issue is too "narrowly focused." Opp. to Rulemaking at 2. Petitioners disagree with the suggestion both that the issue is a narrow one and that the narrowness of an issue makes it somehow unsuitable for rulemaking.

[14] US West is referring to section 202(c) which provides that any carrier who knowing makes an any unjust or unreasonable discrimination is subject to a forfeiture of $6,000 for each offense and $300 for each and every day of the continuance of the offense.

after systems are built, impose forfeitures. It is fairer and more efficient to correct the problem at the outset, before construction is begun.

Conclusion

While Petitioners will reply to other comments filed today, the responses from the telephone companies to date indicate the pressing need for the relief requested in both the Petition for Relief and the Petition for Rulemaking. Petitioners urge the Commission to act quickly to grant that relief, thus avoiding confusion, and ultimately speeding up the provision of advanced telecommunications services to all Americans on an equitable basis.

Respectfully submitted,

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July 12, 1994

Counsel for Petitioners

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:

Petition for Rulemaking	)	
and Petition for Relief	)	DA 94621
in Section 214 Video Dialtone	)	
Applications Process	)	

AFFIDAVIT OF DR. MARK N. COOPER
IN SUPPORT OF THE COMMENTS OF
OF THE
CENTER FOR MEDIA EDUCATION,
THE CONSUMER FEDERATION OF AMERICA,
THE UNITED CHURCH OF CHRIST
THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
NATIONAL COUNCIL OF LA RAZA

I, Dr. Mark N. Cooper, first being duly sworn, hereby state that the following information is true and correct to the best of my knowledge, information and belief:

1. I am the same Mark Cooper who filed an affidavit in support of the petitions filed by the above groups. My initial analysis demonstrated a clear pattern in the initial video dialtone offerings of four of the Regional Bell Operating Companies (RBOCs) in which areas that are predominantly lower income and minority have not been provided video dialtone service.

2. U.S. West has provided the only data-based response to the Commission, thus far.[1] US West's analysis is particularly misleading. Far from demonstrating that there is no problem in their video dialtone applications, US West's opposition to the Petitions for Relief and Rulemaking only reinforces the need for immediate and thorough rulemakings on universal service under video dialtone.

3. Instead of providing census tract data, US West provides a duplicated count of minority groups in exchanges and then summary statistics based on inappropriate definitions of the geographic area of reference. As a result, the analysis proves nothing and denies citizens the opportunity to carefully scrutinize the public policy

[1] Opposition, dated June 2, 1994.

implications of the video dialtone proposal.[2]

4. The duplicated count makes it difficult to conduct thorough analysis, but far from refuting my initial analysis, it presents more evidence that public policy to prevent discrimination should be instituted immediately. Consider the following demographic results for the ten exchanges in Denver City.

   - o Two of the three exchanges in the city with substantial Black populations (above 10 percent of the total) are not served.
   - o Four of the six exchanges with substantial Hispanic populations are not served.
   - o Three of the five exchanges with substantial American Indian populations are not served.
   - o The three lowest income exchanges are not served.

5. US West's duplicated count indicates a smaller difference between served and unserved areas in minority representation than suggested by my preliminary analysis, but the duplication creates uncertainty and the aggregate statistics still show substantial differences between the served and unserved areas of the city, as documented in my initial affidavit. The unserved areas have percentages of

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[2] The duplication stems from the fact that some Blacks and American Indians are also classified as Hispanic, while most Hispanics and American Indians are classified as White. In the heavily minority exchanges, the duplication is very large. Consider the following comparison between the most heavily and least heavily minority exchange in Denver City. The former is not served, the latter is served.

PERCENT OF POPULATION OF VARIOUS ETHNIC/RACIAL GROUPS

Exchange	Total Dup Count	White	Black	Asian Pac Isle	Am Indian	Hispanic
Curtis Park	148	32	31	1	36	48
Denver SW	109	93	1	2	4	9

Hispanics and American Indians that are between approximately 1.5 and 2 times that of the served areas.

PERCENT OF POPULATION: DENVER CITY

Exchange	Black	Asian Pac Isld	Am Indian	Hispanic
Served	9.7	2.5	10.5	20.9
Unserved	8.8	2.1	17.6	29.5

6. Attachments 1 and 2 show maps for Black and Hispanics (the two groups I analyzed in my initial affidavit) and American Indians, a group which was supplied in US West's opposition to the petition for rulemaking.[3] They demonstrate exactly the pattern discussed in my initial affidavit. The suburbs have considerably lower levels of minority populations. Even in the suburbs on an exchange by exchange basis, the more predominantly minority areas are less likely to be served. Attachment 3 shows the distribution of the served and unserved broken down into three regions, city, suburbs and non-target area. By including the predominantly non-minority areas outside of the target area, the company offsets the failure to serve the substantially and predominantly minority areas not served in the center city and target areas.

7. The claim that downtown business districts are not served because they are predominantly business areas overlooks the fact that many people live in these districts and they are frequently the lowest income individuals and tend to be disproportionately minorities.

   - o In Denver for example, the five districts not served have almost 80,000 households and 175,000 people. This is approximately 40 percent of the city of Denver.

   - o The three districts at the heart of the city have a population of almost 80,000. They are predominantly minority and have a median income of approximately $18,500 per year.

[3] The one other group identified by US West (Asian/Pacific Islanders) constitutes a small percentage of the overall population and is quite evenly distributed throughout the service territory.

- o Even the single smallest exchange not served at the center of the city, has almost 25,000 people. It is the most heavily minority and poorest exchange in the Denver area.

Are these people to be denied video dialtone because they live in a business district?

8. As a matter of public policy, US West seeks to use the entire Denver Metropolitan area as the frame of reference for assessing the representativeness of its proposal. I believe that the area used is far too broad to ensure that universal service is provided to all groups on a representative basis. Simply put, this approach would allow companies to not provide service in the predominantly minority areas of central cities and the predominantly non-minority rural areas and still achieve "representativeness." The area used by US West is much larger than a local calling area in telecommunications and much larger than a local franchise area in cable TV. It is much larger than units of local government. Thus, it is neither socially nor economically relevant for the purposes of public policy analysis.

9. It is obvious that US West has the capacity to produce a list of census tracts served and not served as part of its application. Their refusal to do so and suggestion that citizens bear the cost of developing such a list places a heavy burden on local citizen groups to discover information that the company should make readily available. First, the boundaries of the exchanges are must be determined from difficult maps (or obtained by telephone company records). Second, computer runs must be commissioned. Publication of lists of census tracts would enable local groups to use standard census publications carried by many libraries.

10. There is no better example of the problem that the extremely uneven data content of the 214 applications presents than the PacTel filing for Los Angeles. Here is the nation's largest metropolitan area, whose census tract maps cover over 300 square feet, and the company files one, 8.5 inch by 11 inch, piece of paper with hand drawn exchange names and no exchange boundaries identified with regard to any street references. This near total lack of information makes it impossible to analyze which households are being served and which are not.[4]

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[4] For PacTel to complain that I failed to analyze the Los Angeles area (see PacTel's June 2, 1994 letter), given this lack of data, is absurd. PacTel has simply not provided adequate information for the Commission, or anyone else for that matter, to evaluate the video dialtone proposal in the Los Angeles area. For other metropolitan areas the problem is still considerable, but is smaller because the metropolitan areas are smaller, between one-tenth and one-twenty-fifth the size.

STATE OF MARYLAND)
) SS
COUNTY OF MONTGOMERY)

Mark N. Cooper

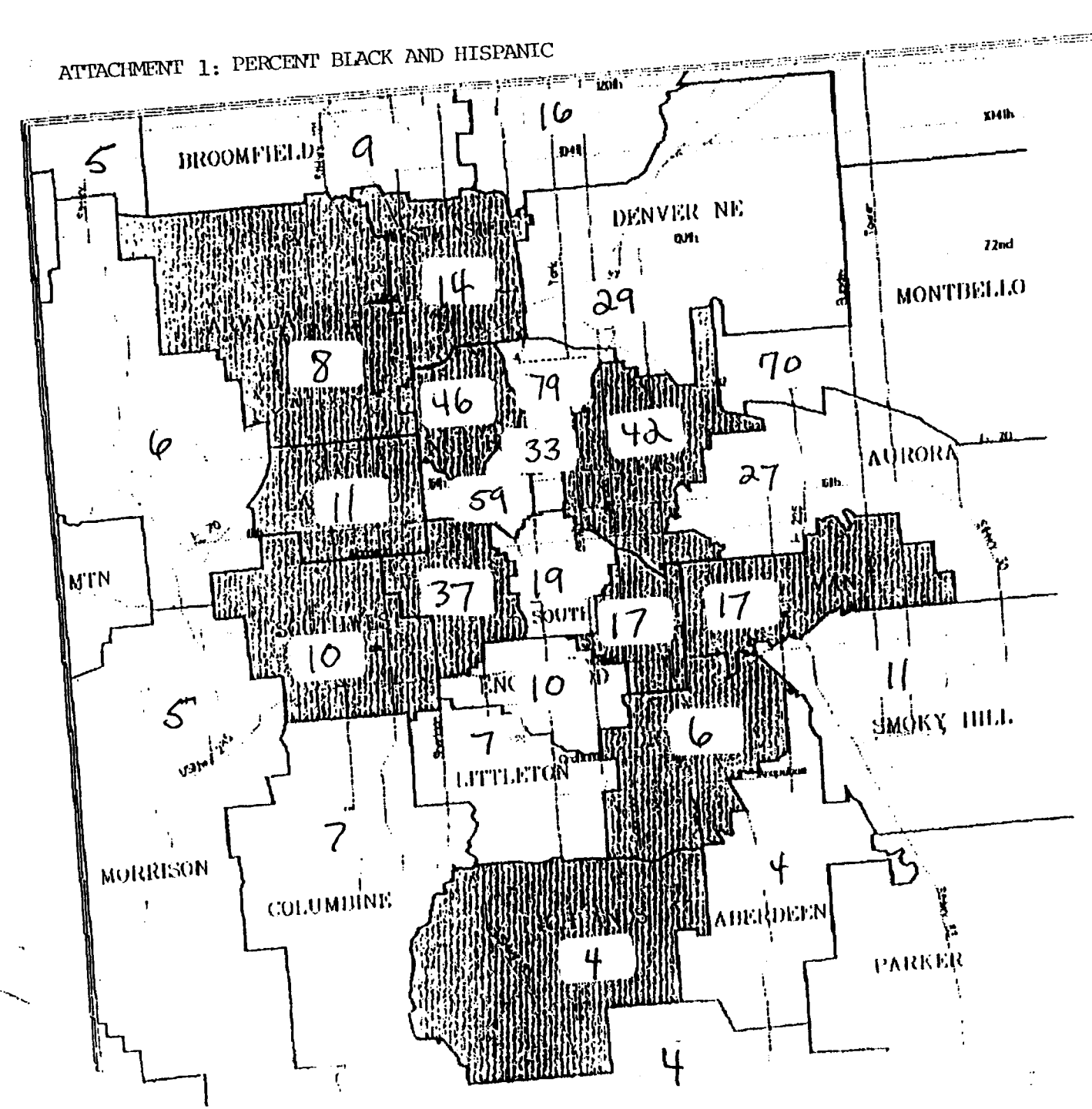
Subscribed and sworn to before me this 11th day of July, 1994.

Notary Public

My Commission Expires July 1, 1997

ATTACHMENT 1: PERCENT BLACK AND HISPANIC

Attachment #3



PROPOSED AREA OF DEPLOYMENT FOR

VIDEO-DIALTONE SERVICE

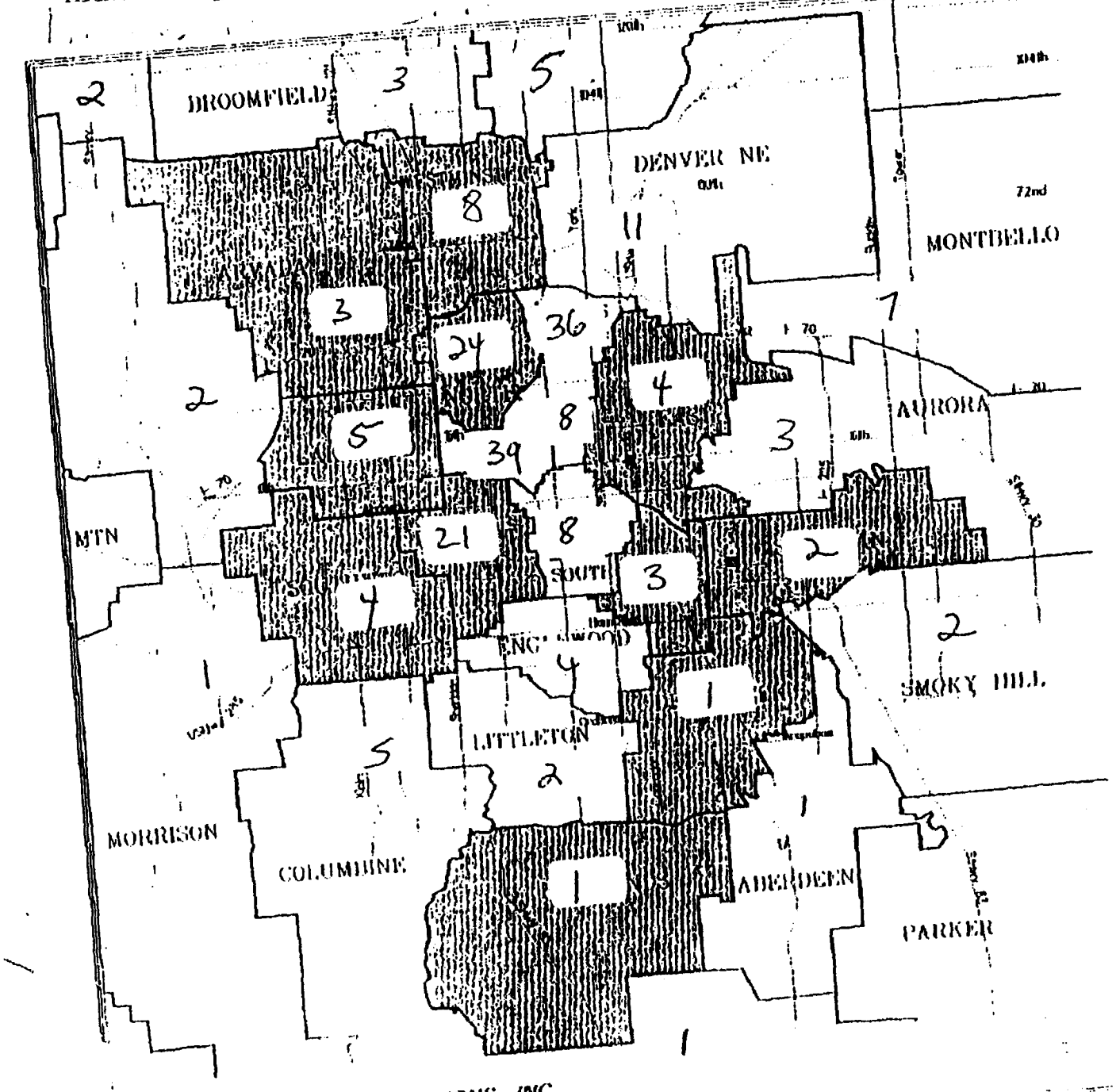
Proposed Area for Deployment by Wire Center

SERVING AREA

US WEST [illegible] IONS, INC.

ATTACHMENT 2: PERCENT AMERICAN INDIAN

Attachment #3



PROPOSED AREA OF DEPLOYMENT FOR

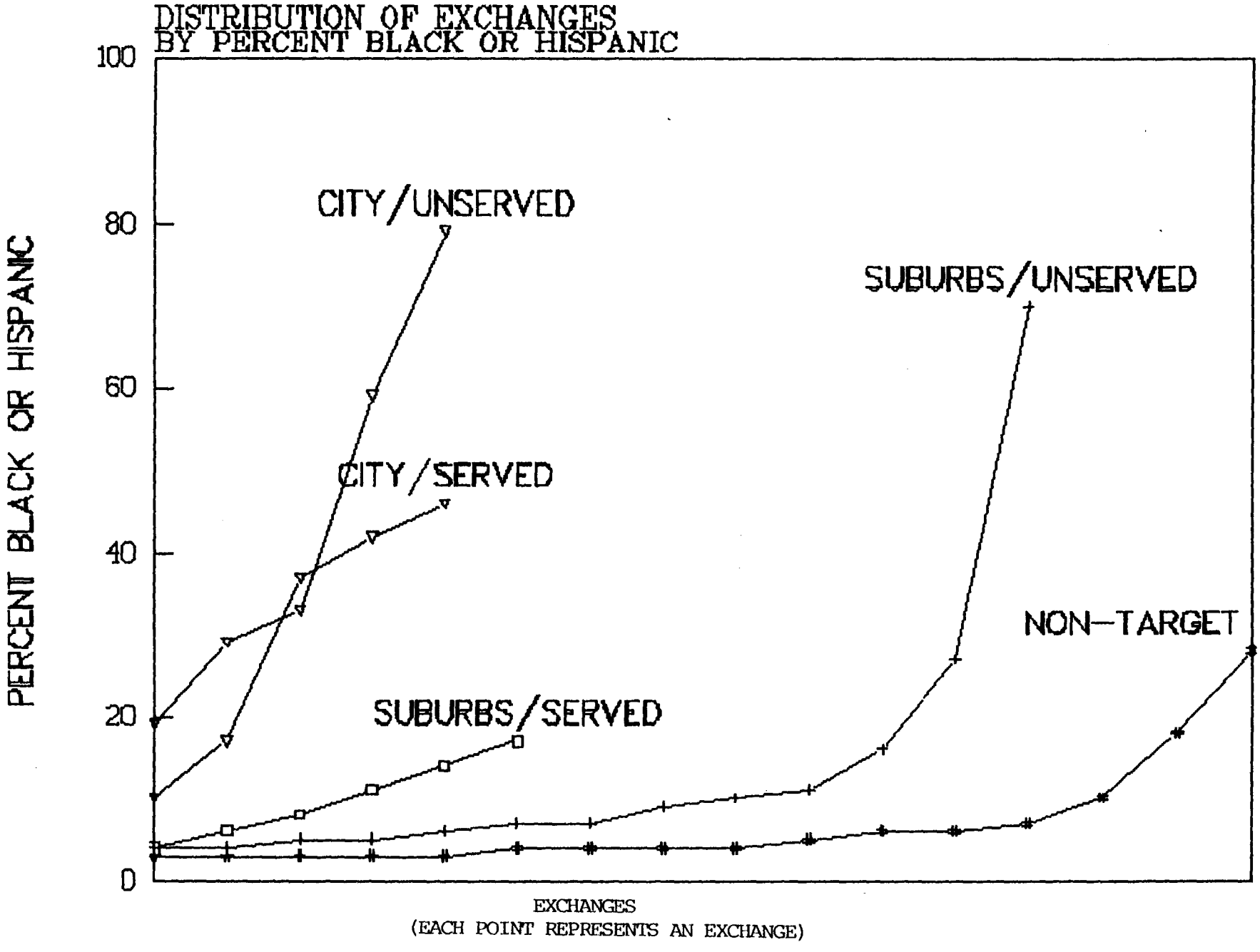
VIDEO-DIALTONE SERVICE

Proposed Area for Deployment by Wire Center

DENVER SERVING AREA

US WEST [illegible]IONS, INC.

ATTACHMENT 3: US WEST DENVER FILING



CERTIFICATE OF SERVICE

I, Anthony Wright, hereby certify that I have this 12th day of July, 1994, mailed by first class United States mail, postage prepaid, a copy of the Comments of CME et al. regarding Petition for Rulemaking and Petition for Relief in Section 214 Video Dialtone Application Process, DA 94-621 to the following:

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